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In The
Supreme Court of the United States

THE PINEY RUN PRESERVATION ASSOCIATION,

Petitioner,

v.

THE COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Should this Court address for the first time an important question of federal law concerning the parameters of "diligent prosecution" under the Clean Water Act in a case where the Fourth Circuit held that a consent judgment between the Maryland Department of the Environment ("MDE") and Carroll County, Maryland constituted "diligent prosecution" of the County's violations of the Clean Water Act even though the consent judgment permitted the County to violate the terms of its existing discharge permit until such time in the future that MDE ruled on the County's request for a more lenient permit?

LIST OF PARTIES TO THE PROCEEDING

The caption of the case includes all parties to the proceeding in the district court and court of appeals.

CORPORATE DISCLOSURE STATEMENT

The Petitioner, The Piney Run Preservation Association, is a § 501(c)(3) not-for-profit corporation. It has no parent corporation and is not owned, wholly or in part, by any publicly-traded corporation

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CITATION TO OFFICIAL, UNOFFICIAL REPORTS OF OPINIONS/ORDERS

The opinion of the United States Court of Appeals for the Fourth Circuit in *The Piney Run Preservation Association v. The County Commissioners of Carroll County, Maryland*, is published at 523 F.3d 453 (4th Cir. 2008). The opinion of the district court, Civil No. AMD 06-3019, is unpublished.

JURISDICTION STATEMENT

On April 23, 2008, the United States Court of Appeals for the Fourth Circuit decided *The Piney Run Preservation Association v. The County Commissioners of Carroll County, Maryland*, 523 F.3d 453 (4th Cir. 2008). The court of appeals issued the mandate on May 15, 2008. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

United States Codes

33 U.S.C. § 1251(a), (130a)
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Maryland Regulations

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STATEMENT OF THE CASE

This Clean Water Act ("CWA") case concerns the discharge of thermally-polluted effluent from a sewage treatment plant into the headwaters of the Piney Run, a trout stream in Maryland. At the discharge point, the quantity of the effluent dominates the stream's small base flow. The County Commissioners of Carroll County, Maryland ("County") own and operate the sewage treatment plant ("Plant"). The Petitioner, the Piney Run Preservation Association ("Association"), is a group of landowners who reside downstream from the Plant.

On January 21, 2004, the Maryland Department of the Environment ("MDE") issued to the County a modified National Pollutant Discharge Elimination System ("NPDES") permit after almost ten years of administrative litigation concerning the terms of the permit.[1]

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[1] During this time, Petitioner also litigated a CWA citizens suit based on the County's former permit. *The Piney Run Preservation Assoc. v. County Commissioners of Carroll County, Maryland*, 268 F.3d 255 (4th Cir. 2001). There, the Fourth Circuit applied the "permit shield" defense to the Association's allegations of violations under the permit and vacated the district court's judgment against the County. *Id.* at 269-72. The circuit court found standing to sue on the part of the Association, *Id.* at 264, and did not disturb the district court's findings regarding harm to stream. *See generally, Id.*

During the administrative litigation, the parties offered competing evidence regarding the effects of the thermal pollution on the stream. The modified permit prohibits the County from discharging effluent warmer than the higher of 20°C (68°F) or the ambient temperature of the stream. The County's discharge of the thermally-polluted effluent violates the terms of its NPDES permit during the warm-weather months.

On July 9, 2004, the County applied to MDE for an alternate effluent limitation to increase the temperature limit so that it could comply with its permit without changing its practices. The County's application for an alternate effluent limitation is still pending before MDE.

On July 12, 2004, the Association sent a 60-day notice to the County under the citizen suit provision of the CWA, Section 505(b), 33 U.S.C.A. § 1365(b). In that notice, the Association alleged that the County was violating the temperature limit in its permit. Under the statute, the Association could bring suit against the County if the government was not "diligently prosecuting" the violations by September 13, 2004. On August 13, MDE recorded a request by the County that MDE file a suit against it and enter into a consent decree regarding the discharge of heated effluent. (129a.)

On September 13, 2004, MDE sued the County alleging violations of the temperature limit and monitoring and reporting provisions of the NPDES permit. As requested by the County, MDE

also consented to a stay of its enforcement action. The stay expired on November 20, 2005. (21a).

On August 3, 2006, MDE and Carroll County entered into a Consent Judgment, thereby settling MDE's enforcement action. The Consent Judgment acknowledged that the County had applied for an alternate effluent limitation. The Consent Judgment included four basic components. First, it required the County to pay $13,500 for its violations prior to the date of the Consent Judgment. (24a-25a, 47a). Second, it required the County to design and implement an "Environmental Project." This work provides mitigation for temperature increases in the Piney Run caused by storm water runoff or modifications to stream buffers. (27a-30a). No part of the "Environmental Project" reduces the temperature of the effluent that comes out the discharge pipe. Third, the Consent Judgment provided that penalties of $500 per day would accrue during the pendency of the County's application for an alternate effluent limitation but that the County need only pay those penalties if "MDE or a final judgment does not approve the alternate effluent limit." (26a). Fourth, if a final judgment disapproves the alternate effluent limit, the County will then have 300 days from that judgment to "implement the measures necessary to comply with the thermal limitations of the Permit." (26a). The County is only required to meet the terms of its current NPDES permit if MDE denies the pending application for alternate effluent limitation. Thus, the Consent Order delays the requirement that the

County comply with the permit until some unknown date in the future. Indeed, the County has violated the temperature limit every year since MDE issued the permit in 2004.

On August 25, 2006, in response to the Consent Judgment, the Association sent a second 60-day notice to the County regarding violations of the NPDES permit. The Association alleged that "the consent judgment does not constitute diligent prosecution of Carroll County's violations of the Clean Water Act." (126a). On November 14, 2006, the Association filed a CWA citizen suit against the County in the United States District Court for the Northern District of Maryland pursuant to Section 505 of the Clean Water Act ("the Act"), 33 U.S.C. § 1365. The Association's complaint also specifically alleged that the Consent Judgment entered into between MDE and the County did not constitute diligent prosecution of the County's CWA violations. (70a).

The County moved to dismiss the Complaint and argued that 33 U.S.C. § 1365(b)(1)(B) barred the Association's suit because MDE's enforcement action and the resulting Consent Judgment constituted "diligent prosecution." The Association argued that the Consent Judgment did not require the County to comply with the temperature limits of its NPDES permit and thus could not constitute diligent prosecution of those violations. On March 15, 2007, the district court granted the County's motion to dismiss.

The Association appealed. The United States Court of Appeals for the Fourth Circuit affirmed. The court of appeals issued its judgment on April 23, 2008.

REASONS FOR GRANTING THE PETITION

This Court should address for the first time the limits of the diligent prosecution bar to citizen suits under the Clean Water Act.

The CWA prohibits the discharge of pollutants into navigable waters of the United States without a permit. 33 U.S.C. § 1362(12)(A). The CWA's citizen suit provision, Section 505, 33 U.S.C.A. § 1365(a)(1), allows citizens to bring a federal action against a discharger who is discharging pollutants either without a permit or in excess of the limits specified in the permit. The CWA requires such citizens to give the discharger, the state agency, and the United States Environmental Protection Agency 60-days notice of their intent to sue. The CWA conditions subject matter jurisdiction upon the government's failure to "diligently prosecute" the same violations. 33 U.S.C. § 1365(b)(1)(B). This case concerns the parameters of diligent prosecution.

The decision below, *The Piney Run Preservation Association v. The County Commissioners of Carroll County, Maryland*, 523 F.3d 453 (4th Cir. 2008) decided an important question of federal law concerning the limits of the diligent prosecution bar to citizen suits under the Clean Water Act. The Fourth Circuit held that a

consent judgment which permitted the County to violate the terms of its existing NPDES permit until such time as MDE rules on the County's request for a more lenient permit constituted "diligent prosecution." The Association contends that the diligent prosecution bar is not satisfied by a consent decree which gives the enforcement agency an indefinite period of time in which to decide whether the polluter must ever come into compliance with a properly-issued permit. This Court has never addressed the parameters of diligent prosecution under the Clean Water Act. Petitioner urges this Court grant *certiorari* in order to settle the question of what constitutes diligent prosecution.

This Court's jurisprudence on citizen suits under the Clean Water Act consists of six opinions: *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 124 S. Ct. 1537 (2004); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 120 S. Ct. 693 (2000); *U.S. Dept. of Energy v. Ohio*, 503 U.S. 607, 112 S. Ct. 1627 (1992); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 108 S. Ct. 376 (1987); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 101 S. Ct. 2615 (1981); *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 101 S. Ct. 1784 (1981).

Two of the six opinions discuss the statutory intent of the CWA citizen suit provision, but they do not explain the parameters of diligent prosecution. In *Gwaltney*, this Court held that citizens should not be permitted to file suit for only past violations "in

order to seek the civil penalties that the Administrator chose to forgo" because such actions would infringe on the Administrator's discretion to enforce the Clean Water Act in the public interest. *Gwaltney*, 484 U.S. at 61, 108 S. Ct. at 383. This Court specifically noted that the statutory language of the citizen suit provision was prospective in nature and substantively similar to the citizen suit provisions of other environmental statutes. *Gwaltney*, 484 U.S. at 57, 108 S. Ct. at 381 (citing Clean Air Act, 42 U.S.C. § 7604; Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972 (1982 ed. and Supp. III); Toxic Substances Control Act, 15 U.S.C. § 2619 (1982 ed. and Supp. IV)). This Court required that citizens make a good faith allegation of ongoing violations in order to satisfy subject matter jurisdiction under the CWA. *Gwaltney*, 484 U.S. at 64, 108 S. Ct. at 385.

In *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, this Court again held that citizens have standing when violations are ongoing at the time they file suit. *Laidlaw*, 528 U.S. at 187-88, 120 S. Ct. at 707-08. This Court further held that a case is not moot unless the discharging party can make a clear showing that "permit violations could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 193, 120 S. Ct. at 711. Justice Scalia, in his dissent, suggested that the issue of diligent prosecution was still open on remand and opined that citizen suit provision was not intended as an opportunity to second guess the actions of state enforcement agencies. *Laidlaw*, 528 U.S. at 212, 120 S. Ct. at 720 n.4 (Scalia, J., dissenting).

None of the other four cases refers to diligent prosecution. *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 124 S. Ct. 1537 (2004)(addressing the issue of whether a pumping station requires an NPDES permit); *U.S. Dept. of Energy v. Ohio*, 503 U.S. 607, 112 S. Ct. 1627 (1992)(addressing whether the federal government has sovereign immunity from liability for fines under the Clean Water Act); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 101 S. Ct. 2615 (1981)(discussing who may file suit under the citizen suit provision of the Clean Water Act); *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 101 S. Ct. 1784 (1981)(addressing the interplay between federal common law pertaining to pollution nuisances and the newly enacted Clean Water Act). Thus, the Court has never defined the parameters of diligent prosecution in the context of a CWA citizen suit.

This Court has noted the similarities among the citizen suit provisions of various environmental statutes. *See, Gwaltney*, 484 U.S. at 57, 108 S. Ct. at 381; *see also, U.S. Dept. of Energy v. Ohio*, 503 U.S. at 615-16, 112 S. Ct. at 1633-34 (comparing the citizen suit provisions of the Clean Water Act and the Resource Conservation and Recovery Act). This Court has not addressed the parameters of diligent prosecution under the Clean Air Act, the Resource Conservation and Recovery Act, or the Toxic Substances Control Act.

Several circuit courts addressed the parameters of diligent prosecution under the CWA

and afforded the agencies a choice of enforcement methods. In each of these cases, the agency required the polluter to address the alleged violation by a date-certain. *See*, *Karr v. Hefner*, 475 F.3d 1192, 1194, 1197 (10th Cir. 2007) (noting that an agency's prosecutorial strategy does not have to mirror the citizen suit to establish diligence, but further noted that the consent decree did enjoin further CWA violations); *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994) (finding that a consent agreement does not fail to be diligent prosecution merely because a compromise was reached, especially when the evidence presented shows that the polluter had "to correct the violations," a compliance and reporting schedule was imposed, and monetary penalties were assessed); *North and South Rivers Watershed Ass'n, Inc. v. Town of Scituate,* 949 F.2d 552, 554-55, 558 (1st Cir. 1991) (stating that citizen suits are not appropriate "[m]erely because the State may not be taking the precise action Appellant wants it to or moving with the alacrity Appellant desires," and holding that the state enforcement agency established diligent prosecution where the consent agreement established a definite timeline for compliance and "[t]he record show[ed] the town [ ] complied with a variety of mandatory and ongoing tasks"). Further, where an enforcement agency has brought suit, courts have presumed diligence. *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage Dist.*, 382 F.3d 743, 760 (7th Cir. 2004) (noting that "diligence on the part of the [enforcement agency] is presumed."); *see also Friends of the Earth, Inc. v. Laidlaw Environmental Services*

(TOC), Inc., 890 F. Supp. 470, 487 (D.S.C. 1995) (noting the same).

However, federal courts addressing diligent prosecution have also recognized limits to the amount of deference owed to the enforcement agency. Most recently, the Fifth Circuit, in *Environmental Conservation Organization v. City of Dallas*, ___ F.3d ___, 2008 WL 2174066 at 7 (5th Cir 2008), stated, "[i]f a citizen-suit plaintiff demonstrates that there is a realistic prospect that the violations alleged in its complaint will continue notwithstanding the government-backed consent decree, then a less-than-diligent prosecution might have been shown." The Court of Appeals for the Seventh Circuit has recognized that "a diligent prosecution analysis requires more than mere acceptance at face value of the potentially self-serving statements of a state agency and the violator with whom it settled regarding their intent with respect to the effect of the settlement." *Friends of Milwaukee's Rivers*, 382 F.3d at 760. Indeed, several district courts have held that any presumption of deference paid to the enforcement agency can be rebutted upon a showing that the agency "has engaged in a pattern of conduct in its prosecution that could be considered dilatory, collusive or otherwise in bad faith." *Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173, 183 (D. Conn. 1991) (quoting *Connecticut Fund For Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986), *aff'd in part, rev'd in part*, 989 F.2d 1305 (2d Cir. 1993); *see also Culbertson v. Coats American, Inc.*, 913 F. Supp. 1572, 1579 (N.D. Ga. 1995) (holding that an agency's failure to require

compliance with effluent levels in an NPDES permit was a mere extension of deadlines and not diligent prosecution).

In each of these cases, the governmental prosecution of the violations addressed the quality or nature of the actual discharge. *Friends of Milwaukee's Rivers*, 382 F.3d at 750-51 (noting that the stipulation required the discharger to spend $907,000,000.00 and established a schedule to establish compliance with the CWA); *Environmental Conservation Organization*, 2008 WL 2174066 at 2, 8 (providing that the consent decree which set forth penalties, a compliance time table, and reporting requirements "resolved" all CWA violations); *Remington Arms Co.*, 777 F. Supp. at 176, 187 (noting that the state enforcement agency ordered "that Remington cease the discharge of lead shot to the waters of the State of Connecticut" and that defendant had closed its gun club and kept it closed); *but see Culbertson*, 913 F. Supp. 1572, 1576 (finding a lack of diligent prosecution where the state enforcement agency had obtained a judgment requiring the discharger to "either comply with the copper and zinc effluent limitations of the [NPDES] permit, or submit a final report proposing site-specific effluent limitations" and further extended deadlines). In contrast, the Fourth Circuit's ruling below held for the first time held that a consent agreement that does not require the polluter to change the characteristics or quality of the actual discharge can constitute diligent prosecution.

Here, the Court is squarely presented with a case with a concise record which will allow this Court to efficiently address, for the first time, the parameters of the "diligent prosecution" bar to citizen suits. The Association respectfully requests that this Court grant *certiorari* to determine whether a consent decree which does not require the polluter to change its conduct regarding ongoing violations should bar a citizen suit. A decision by the Court on this issue would guide litigants and courts in cases under the CWA and other environmental statutes with similar provisions.

CONCLUSION

This petition presents an opportunity for this Court to clarify the limits of the diligent prosecution bar to citizen suits under the Clean Water Act and other federal environmental statutes. This Court has not previously addressed this matter, and the Association respectfully requests that this Court grant certiorari to review this case.

Respectfully submitted,

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